U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS J. DOWDY and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 01-1915; Submitted on the Record;
Issued May 20, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability commencing in August 1999, causally related to her March 6, 1999 employment-related cervical soft tissue muscular strain injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a further review of her case on its merits under 5 U.S.C. § 8128(a).

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the October 20, 2000 decision of the Office hearing representative, finalized on October 26, 2000, is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.

By letter dated January 22, 2001, appellant, through her representative, requested reconsideration of the October 26, 2000 decision, and in support he submitted further medical evidence.

A November 27, 2000 report from Dr. James T. Gaylon, a Board-certified orthopedic surgeon, noted:

> "[Appellant] continues to have significant cervical pain with radiation into her neck and shoulders, more specifically to the left arm, neck and shoulder. She does have a chronic condition, degenerative cervical disc disease, which was aggravated by an incident in which she caught her feet in a plastic bag at work and fell in March 1999. She had been having trouble prior to that and had been treated both by me and by Dr. [K. Blake] Ragsdale[, a Board-certified orthopedic surgeon,].... I am continuing to follow and treat her on a symptomatic basis as her orthopedic surgeon. I believe this will be an on-going problem. I do believe that she will have to have restrictions in her work activities, which would prevent her from performing frequent lifting ... or working above the shoulder level."

Also submitted were Dr. Gaylon's medical treatment notes dating from May 24 to September 12, 2000.

In a January 7, 2001 personal statement, appellant requested that her earlier claim No. 06-0713074 be reopened and she claimed that she had suffered permanent physical impairment from that injury which needed continued medical treatment.[1] She further claimed that her condition related to her March 6, 1999 injury persisted and also resulted in permanent physical impairment which required further medical treatment.[2] Appellant claimed that she continued to experience significant pain and problems with her neck, shoulders, left arm, left leg, upper back, and occasionally her lower back as a result of both of her injuries. She requested authorization to see Dr. Gaylon on a permanent basis.

Appellant also submitted a July 17, 1997 report from Dr. Ragsdale, which provided a whole person impairment rating based upon appellant's cervical spine injury. She additionally submitted an October 9, 1997 report from Dr. Ragsdale which reiterated his previously determined whole person impairment rating.

By decision dated March 14, 2001, the Office declined to reopen appellant's case for further review, finding that the evidence submitted in support was insufficient to warrant reopening of appellant's claim for a further review under 5 U.S.C. § 8128(a) on its merits. The Office found, after a limited review of the evidence, that Dr. Ragsdale's reports preceded the 1998 and 1999 injuries and therefore had no probative value with regard to her recurrence claim. It further found that the report and office notes from Dr. Gaylon were cumulative of his previously submitted reports and therefore were insufficient to warrant a reopening of appellant's case for a further review on its merits.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a further review under 5 U.S.C. § 8128(a) on its merits.

The Federal Register dated November 25, 1998 advised that effective January 4, 1999, certain changes to 20 C.F.R. § Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

> "(b) The application for reconsideration, including all supporting documents, must:
>
> (1) Be submitted in writing;

[1] The most recent decision in case No. 06-0713074, dated October 16, 1998 regarding an October 5, 1998 injury, is not adverse to appellant, and it accepted her claim for "cervical strain superimposed on cervical facet syndrome, resolved and a contusion of the right leg, resolved." However, the related nonfatal summary indicated that the accepted contusion injury was for the left leg.

[2] This claim was accepted for cervical strain only.

(2) Set forth arguments and contain evidence that either:

(i) Shows that [the Office] erroneously applied or interpreted a specific point of law;

(ii) Advances a relevant legal argument not previously considered by [the Office]; or

(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[3]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[5] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] Evidence which does not address the particular issue involved is irrelevant, and therefore does not constitute a basis for reopening a case.[7] Further, evidence which is repetitive or cumulative of that already in the record also does not constitute a basis for reopening a case.[8]

In support of her reconsideration request appellant submitted two reports from Dr. Ragsdale which predated both of appellant's 1998 and 1999 injuries, and therefore did not address the issue involved and had no probative value in determining whether she sustained a recurrence of disability, causally related to either of those injuries. Consequently, the reports provide no basis for reopening appellant's case for a further review on its merits.

Appellant also submitted a new report from Dr. Gaylon and some medical office progress notes. The Office, therefore, applied the third standard articulated in 5 U.S.C. § 8128(b)(2)(iii), (*see also* 20 C.F.R. § 10.606 (b)(1),(2)), but after a cursory review the Office determined that the substance of the new report and the progress notes was cumulative in nature of evidence already submitted to record and considered by the Office, and determined that this evidence did not identify or address any recurrence of disability in August 1999, causally related to appellant's March 1999 injury. Consequently, this evidence also did not provide any basis for reopening

[3] 20 C.F.R. § 10.606 (b)(1), (2).

[4] 20 C.F.R. § 10.607(a).

[5] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] *See Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[7] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 228 (1984).

[8] *Eugene F. Butler*, 36 ECAB 393 (1984).

appellant's case for a further review on its merits and appellant has not established that the Office abused its discretion by denying her request for review of its October 20, 2000 decision.

The Board now independently reviews the submitted evidence and concurs with the Office's determination for the same reasons articulated above. However, the Board notes that, although the hearing representative applied the general standard for appellant's burden of proof in a recurrence claim and found that the evidence of record did not support such claimed recurrence, the standard appropriate to the facts in this case is as follows:

> "An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he or she cannot perform the light duty.[9] As part of this burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements."[10]

The Board notes that, in reviewing the evidence submitted in support of appellant's recurrence claim and her reconsideration request, she has shown none of this. She returned to limited duty following her March 6, 1999 cervical soft tissue muscular strain injury and continued to work successfully at that limited duty through November 27, 2000, the date of Dr. Gaylon's most recent report. Appellant neither alleged nor demonstrated that she experienced an August 1999 change in the nature or extent of her injury-related condition, or an August 1999 change in the nature or extent of her limited job duties. Moreover, none of the medical reports of record subsequent to appellant's claimed recurrence of disability from Drs. Gaylon, Manugian, Bellur or Kellett addressed any August 1999 change in the nature or extent of her injury-related condition, and therefore all of them were insufficient to establish appellant's recurrence claim under *Hedman.*[11] Appellant has therefore failed to establish that she sustained any recurrence of disability in August 1999, and has failed to submit any probative evidence sufficient to support a reopening of her claim for further review on its merits.

[9] *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *Id.*

[11] *Id.*

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 14, 2001 and October 20, 2000 are hereby affirmed.

Dated, Washington, DC
May 20, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member